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NOS. 924 AND 925

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

JAMES ALLEGRETTI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

LOUIS DARLAK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MAURICE J. WALSH
105 West Adams Street
Chicago, Illinois 60603

ANNA R. LAVIN
209 So. La Salle Street
Chicago, Illinois 60604
Attorneys for Petitioner, James Allegretti.

FRANK W. OLIVER
30 N. La Salle Street
Chicago, Illinois 60603
Attorney for Petitioner, Louis Darlak.

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LAkeview 5-6581

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To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, James Allegretti and Louis Darlak, respectfully pray this Court grant a rehearing of its denial of the Petition for Writ of Certiorari heretofore entered in this cause.

The grounds relied upon in urging this Court grant rehearing are that the petitioners had available to them other substantial grounds not previously presented to this Court upon the Petition for the Writ of Certiorari, (though presented to the Court below, the United States Court of Appeals for the Seventh Circuit), and the overwhelming importance of the grounds have become apparent only in the light of the Solicitor General's confession of error in *James Fred Baxa and Clyde Church* v. *United States of America*, No. 957, October Term, 1964.

The *Baxa* case and this case both initiated in the District Courts of the Southern District of Illinois, Northern Division. The same trial judge presided. The same Court of Appeals affirmed both cases. The pivotal question in both cases was the same.

In the case at bar, a reversal was had in the first instance because of an instruction concerning conspiracy, wherein toward the close of the Government's case the trial judge ruled "that the Government had sustained its avowed burden, and has shown to the satisfaction of the Court that a connection does exist between each such act, conversation and statement of the several defendants." *United States* v. *Allegretti*, 7 Cir., 340 F.2d 243, 245. A similar instruction was given in the *Baxa* case. *United States* v. *Baxa*, 7 Cir., 340 F.2d 259, 262.

In the first instance the judgment of conviction in this cause was reversed by the United States Court of Appeals for the Seventh Circuit on the ground that the instruction invaded the province of the jury. The United States of America petitioned for Rehearing *en banc*, and urged before the Court of Appeals that the unusual *en banc* Court be convened to review the decision of the three-judge panel principally because of the pendency of the *Baxa* case. Its

urging upon the Court of Appeals for the Seventh Circuit read as follows:

> "There is presently pending before the bar of this Court an appeal entitled '*United States of America* v. *James Fred Baxa and Clyde Church*, No. 14386'. The appeal is taken from the United States District Court for the Southern District of Illinois, Northern Division, Judge Mercer presiding. The identical question determined by this Court's opinion in the instant appeal is again submitted for consideration to this Court. (See Appellants' Appendix, pp. 45 and 46, and Appellants' Brief, pp. 26-33, in *United States* v. *Baxa, et al.*, No. 14386.) It may very well be that another and different panel of this Court may be called upon to determine the appellants' contention in *United States* v. *Baxa, et al.*, No. 14386.
>
> In view of the pendency of *United States* v. *Baxa, et al.*, it is the respectful suggestion of the Government that rehearing en banc be granted herein, in order to achieve that uniformity of interpretation which is an essential of the proper administration of justice." pp. 7-8

Sitting *en banc*, the Court of Appeals for the Seventh Circuit reversed its original determination and affirmed in this cause. (340 F.2d 254). The *Baxa* decision was held up pending the determination in this cause, and on the basis of the decision in this cause, it also was affirmed (340 F.2d 259). The Court will notice that the three decisions, the two in this case, and the one in *Baxa*, follow one upon the other in the Federal Reporter.

These cases, running almost parallel had many questions in common. Not the least among them, though *Baxa* was a much shorter case, was the identical legal question whereupon the Solicitor General has confessed error in *Baxa*. In *Baxa*, upon arrest, a co-conspirator, Scheri, was

asked who sent him to handle the stolen goods. He answered—"Well, I am in enough trouble now. I don't want to get anyone else into any trouble." He also said—"If you play the game, you have to pay", and "It's sure true what they say about crime doesn't pay." (340 F.2d at p. 262)

In the case at bar a co-conspirator Falzone was arrested on March 17, 1958. A Government informer told of the conversation had with Falzone the following day, which is set forth in the narrated appendix which follows:

> "I saw Mr. Falzone the following day. I'm not positive whether the conversation I had with him took place at the Cafe Continental or the Banquet on a Bun, which is just around the corner from the Cafe Continental. We were sitting, having coffee and something to eat, we were discussing the whiskey case. There were people in there, but I just don't recall who. He said he wasn't going to take the rap for this whiskey by himself, that he was going to put Dave—he mentioned Jimmy, Ruffy, Louie. He said: 'They're the guys the whiskey belongs to and I'm not gonna take the whole fall myself.' At a later conversation he said, 'But, I am not too worried, Jimmy will straighten the whole case out for us.' Jimmy was Mr. Allegretti (witness identified Defendant Allegretti for the record) Ruffy who is Joseph Lisendrello. (Identifying Defendant Joseph Lisendrello.) (Motion made to strike the testimony on the ground that the conversation cannot be applicable to any defendant not present, ruling reserved)." (App. 69).

Later, at the behest of the government, all the evidence and testimony upon which the Court had reserved ruling theretofore, was overruled:

> "At this time, therefore, I overrule each objection as to which my ruling was reserved from time to time as such objections were made; and I now rule that the

testimony relating to the acts, conversations and statements by the several defendants and in each such instance is admissible and admitted as evidence against all of the defendants whether or not each was present when such acts were done, such conversations were had or such statements were made." (App. 296-297)

We submit it is apparent, that the similarity between *Baxa* and this case existed not only in the instruction of the Court that the Government had sustained its "avowed burden" of showing the connection among the defendants, but also in the admission of the evidence detailed hereinbefore. Of the said remarks, the Solicitor General in its Memorandum in *Baxa*, No. 957, said at pages 8 and 9:

> "We are persuaded that petitioners are correct in their claim (question 2) that it was reversible error for the trial court to admit testimony regarding Scheri's self-incriminatory statements to the F.B.I. ("If you play the game, you have got to pay" and "it's sure true what they say about crime doesn't pay.") without instructing the jury that this testimony was to be considered only against Scheri and not against the other defendants.
>
> The governing legal principles were accurately stated by the court of appeals but were incorrectly applied, we think, to the present facts for two reasons. First, it seems probable that, at the time these conversations took place, the conspiracy was at an end, since all of its members had been apprehended (if not formally arrested) by the F.B.I. Second, even if the conspiracy was still going on, Scheri's admissions were not 'made pursuant to and in furtherance of [its] objectives.' *Krulewitch* v. *United States*, 336 U.S. 440, 442-443. There is no indication that the statements were made with a view to shielding Scheri's co-conspirators or throwing the investigators off the track. Thus, here, as in *Fiswick* v. *United States*, 329 U.S. 211, 217, 'confession or admission by one co-conspirator after he

[had] been apprehended [was] not in any sense a furtherance of the criminal enterprise.' Accordingly, the testimony was inadmissible against Scheri's co-conspirators, none of whom was present at the time the statements were made. Petitioners were therefore entitled to a limiting instruction at the time the evidence was admitted and to an instruction directing the jury to disregard the testimony altogether when Scheri pleaded guilty at the end of the government's presentation."

We submit that if this Court acts affirmatively in accordance with the confession of error of the Solicitor General, this decision is in direct and clear conflict as approving the same error.

CONCLUSION.

Wherefore, for the above and foregoing reasons, it is respectfully prayed that this Court grant a rehearing herein, and issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit and, upon such review, reverse the decision of that Court in this cause.

Respectfully submitted,

MAURICE J. WALSH
ANNA R. LAVIN,
Attorneys for petitioner,
James Allegretti

FRANK OLIVER
Attorney for petitioner,
Louis Darlak.

CERTIFICATE OF COUNSEL

Anna R. Lavin, a member of the Bar of this Honorable Court hereby certifies that the above Petition for Rehearing is presented in good faith and not for delay, and is restricted to substantial grounds available to Petitioners and not previously presented.

ANNA R. LAVIN